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No. 16-980

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In The Supreme Court of the United States

JON HUSTED, Ohio Secretary of State,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF GEORGIA AND 16 OTHER STATES AS AMICI CURIAE SUPPORTING PETITIONER

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INTERESTS OF AMICI CURIAE

Above all else, Georgia and the other amici States need to know, with specificity, how they can meet their list-maintenance obligations under the National Voter Registration Act (NVRA) lawfully. Many states require or at least permit list-maintenance programs similar to the Ohio program challenged in this case (Pet. 17-18), and they need a clear answer on whether the NVRA permits it – and if not, what specific steps the NVRA permits states to take to comply with their statutory obligations. This clarity matters a great deal because many of the amici States are regularly threatened with or involved in burdensome litigation regarding list-maintenance programs. Some challenges are like this one, alleging that a list-maintenance process removes people who should not be removed. Other times the challenge comes from the other side, alleging that a state has not sufficiently complied with its obligation to maintain accurate registration lists. And some states are whipsawed with both kinds of litigation at the same time. Pet. 19-21. At a minimum, the states need this Court to help end this churn of litigation by explaining in clear terms the NVRA's limits on how states may carry out their statutory obligations.

The amici States also have an interest in preserving accurate, effective, and efficient means of conducting list maintenance. Keeping a statewide voter-registration list and implementing a system that removes ineligible voters from that list as the NVRA requires is a substantial and expensive undertaking. States with finite resources need targeted,

efficient ways to remove ineligible voters while ensuring that they keep eligible voters on the list. Relying on change-of-address data from the U.S. Postal Service is one way, but using that data alone certainly will leave many ineligible voters on states' lists; after all, a great many people do not notify the Postal Service when they move. Pet. 33-34. States could hypothetically send mass mailings to *all* voters, but this approach could be prohibitively expensive. Pet. 34. Thus, many states require or permit list-maintenance processes similar to Ohio's, which begins an address-confirmation procedure the NVRA expressly permits by sending confirmation notices only to voters who have had no contact with elections officers for some time. The amici States believe this process and others like it are accurate, cost-effective, and permissible means of carrying out their list-maintenance obligations under the NVRA.

SUMMARY OF ARGUMENT

The NVRA requires the states to implement programs that make reasonable efforts to remove from voter-registration lists the names of people who have moved or passed away. To this end, the NVRA permits states to remove a person's name from the voter-registration list if the person fails to respond to an address-confirmation notice and then also fails to vote in the next two consecutive general federal elections (the "Confirmation Procedure"). The NVRA also prohibits states from executing a program that "result[s]

in the removal of" a person's name from a voter list "by reason of the person's failure to vote" (the "Failure-To-Vote Clause").

Careful application of the relevant canons of construction makes clear that a state does not violate the NVRA's Failure-To-Vote Clause by doing what Ohio does: using failure-to-vote data to identify registered voters who may have moved, and then sending those voters address-confirmation notices as the Confirmation Procedure permits.

First, applying the ordinary-meaning canon avoids the court of appeals' mistaken importation of a "but for" causation standard into the Failure-To-Vote Clause.

Second, applying the prior-construction canon makes clear that Congress incorporated a proximate-cause standard into the Failure-To-Vote Clause by using the phrase "by reason of." Under any of the various formulations of the proximate-cause standard, a person's failure to vote does not proximately cause the removal of a person's name from the official list of voters under Ohio's list-maintenance process.

Third, applying the whole-text canon shows that the Failure-To-Vote Clause incorporates a specific proximate-cause standard: the common-law formulation of the standard that cuts off liability if a proximate cause was not the *sole* proximate cause.

Fourth, the harmonious-reading canon confirms that the Failure-To-Vote Clause does not categorically

prohibit considering failure-to-vote data as part of a list-maintenance process. If it did, then Congress wrote into the NVRA an open and irreconcilable conflict between the Failure-To-Vote Clause and the Confirmation Procedure. The harmonious-reading canon precludes such a reading when, as here, a more harmonious one is available.

Fifth, acknowledging the difference between provisos and exceptions further supports not treating the Failure-To-Vote Clause as a categorical prohibition on the use of failure-to-vote data. The Help America Vote Act's (HAVA's) later-enacted clarification of the Failure-To-Vote Clause is best read as a proviso because it expressly serves as a rule of construction, not an exception to a general prohibition. As such, that Clarification Amendment simply explains that the Failure-To-Vote Clause *itself* does not prohibit states from using failure-to-vote data for list maintenance as part of the Confirmation Procedure. For that to be true, the Failure-To-Vote Clause has to be something less than a categorical prohibition.

ARGUMENT

To protect the integrity of the electoral process, the NVRA requires each state to conduct a program that "makes a reasonable effort to remove" from its voter registration list the names of people who have moved or passed away. 52 U.S.C. § 20507(a)(4).

This case concerns seemingly conflicting statutory instructions given to states carrying out this list-maintenance obligation. On one hand, the NVRA permits states to remove a person's name from the voter registration list if the person fails to respond to an address-confirmation notice and then also fails to vote (or appear to vote) in the next two consecutive general federal elections. 52 U.S.C. § 20507(d)(1)(B) ("Confirmation Procedure"). On the other hand, the Act prohibits states from executing a program that "result[s] in the removal of" a person's name from a voter list "by reason of the person's failure to vote." *Id.* § 20507(b)(2) ("Failure-To-Vote Clause").

Ohio implemented the NVRA's Confirmation Procedure for removing people's names on the ground that they have moved. Ohio sends the notice required by the Confirmation Procedure if a person has not voted (or otherwise had contact with election officials) for two years. Respondents in this case sued Ohio's Secretary of State for using that process, and that ultimately gave rise to the question of statutory construction presented here: Does a state violate the NVRA's Failure-To-Vote Clause by using failure-to-vote data to identify registered voters who may have moved, and then sending those voters address-confirmation notices as the Confirmation Procedure permits?

Petitioner Husted has provided many good reasons for concluding that the NVRA allows such a process. The amici States highlight and expand on a particular set of those reasons here. Specifically, we will show that careful application of the relevant

canons of statutory construction support Ohio's position. What follows is a guide for applying those canons, which will show that, contrary to the court of appeals' conclusion, the NVRA does not prohibit states from sending address-confirmation notices to people after they have not voted for a set amount of time.

A. Apply the ordinary-meaning canon: assume the contextually appropriate ordinary meaning of words.

Most common English words have numerous dictionary definitions. The ordinary-meaning canon requires courts to apply the one that is appropriate in light of the word's context. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012) ("One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise."); *see also Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016) (a word "takes on different meanings in different contexts").

We start with the ordinary-meaning canon and its focus on context because this is where the court of appeals first derailed in construing the Failure-To-Vote Clause. That clause provides that a state's list-maintenance program "shall not *result in* the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added). A quick review of dictionaries reveals that the word "result" can take on many meanings. "Yet context disambiguates." Scalia &

Garner, *supra* at 70. "Result in" is a transitive phrasal verb, *i.e.*, a verb-plus-preposition that has an object (here, "the removal"). *See, e.g.*, *Result in, Macmillan Dictionary*, https://goo.gl/hdTfRa (last visited Aug. 2, 2017). The transitive phrasal verb "result in" means "to cause (something) to happen" or "to produce (something) as a result." *Result in, Merriam-Webster Online Dictionary*, https://goo.gl/bKNwVG (last visited Aug. 2, 2017); *see also Result in, New Oxford American Dictionary* (3d ed. 2010) ("have (a specified end or outcome)"); *Result in, Cambridge Phrasal Verbs Dictionary* (2d ed. 2006) ("to cause something to happen, or to make a situation exist"); *Result in, Oxford Dictionary of Phrasal Verbs* (1st ed. 1993) ("have (sth) as an outcome or consequence").[1]

Applying the contextually appropriate ordinary meaning of "result in," the Failure-To-Vote Clause provides that a state's list-maintenance program "shall not result in" – *i.e.*, cause or produce – "the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2).

Violating the ordinary-meaning canon was the court of appeals' first mistake. Instead of recognizing and then construing the transitive phrasal verb "result in," the court of appeals ignored context and adopted a definition of the intransitive verb "result," *i.e.*, "to

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[1] A related canon that also supports this construction: "[W]ords are to be given the meaning the proper grammar and usage would assign them." Scalia & Garner, *supra* at 140 (citing *Flora v. United States*, 362 U.S. 145, 150 (1960)).

proceed or arise as a consequence, effect, or conclusion." Pet. App. 21a (citations omitted). Because the court picked a definition of the wrong verb form of "result," using its chosen definition in context renders the Failure-To-Vote Clause nonsensical. Inserting the court of appeals' definition of "result" where that term sits within the text of the Failure-To-Vote Clause looks like this: A state's list-maintenance program "shall not [*proceed or arise as a consequence, effect or conclusion*] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). The definition the court of appeals chose makes no sense placed where it is supposed to fit in the statute Congress wrote and enacted.

By contrast, applying the contextually appropriate ordinary meaning of "result in" fits comfortably in the Failure-To-Vote Clause, both grammatically and linguistically. Under that construction, the Clause provides that a state's list-maintenance program "shall not [*cause or produce*] the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." *Id.*

B. Apply the prior-construction canon: when courts have settled the meaning of statutory language, presume the same language enacted in a new statute carries the same meaning.

Congress does not write on a blank slate. It passes laws and courts interpret them. When Congress passes new laws and uses the same language it used in those old laws, the judicial interpretations of that language ordinarily come along for the ride. That, in a nutshell, is the prior-construction canon. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").

The prior-construction canon plays a key role here. Under the Failure-To-Vote Clause, state list-maintenance programs may not cause the removal of voters "*by reason of* the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added). The phrase "by reason of" is a well-known statutory term of art. As this Court has repeatedly held, that phrase incorporates the proximate-cause standard, a type of causation that is significantly narrower than "but for" causation. *See, e.g.*, *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-35 (1983); *see also Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 221-22 (2012). Because this Court had settled this meaning of "by reason of"

before the NVRA was enacted, Congress's "repetition of the same language in" the Failure-To-Vote Clause indicates an "intent to incorporate" the technical legal sense of the phrase in that clause. *Bragdon*, 524 U.S. at 645.

Applying the ordinary meaning of "result in" and this Court's prior constructions of "by reason of" here, the Failure-To-Vote Clause provides that a state's list-maintenance program "shall not result in" – *i.e.*, cause or produce – "the removal of the name of any person from the official list of voters . . . by reason of" – *i.e.*, proximately caused by – "the person's failure to vote." 52 U.S.C. § 20507(b)(2). The upshot: to show that a state list-maintenance process violates the Failure-To-Vote Clause, a plaintiff must show that the state has made failure to vote a proximate cause of the removal of a person from the official list of voters.

Proximate cause is "shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). Courts have implemented that policy-based judgment with various formulas. *Id.* at 693, 701. Some have required a "direct relation between the injury asserted and the injurious conduct alleged," and excluded any "link that is 'too remote,' 'purely contingent,' or 'indirec[t].'" *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (alteration in original) (quoting *Holmes*, 503 U.S. at 268, 271). Others have applied various tests, including "the immediate or nearest antecedent test;

the efficient, producing cause test; the substantial factor test; and the probable, or natural and probable, or foreseeable consequence test." *CSX Transp.*, 564 U.S. at 701 (citations omitted). Still others have "cut off liability if a 'proximate cause' was not the *sole* proximate cause." *Id.* at 693 (citing W. Keeton, Dan B. Dobbs, et al., *Prosser and Keeton on Torts* § 65, p. 452 (5th ed. 1984) (noting the "tendency . . . to look for some single, principal, dominant, 'proximate' cause of every injury")).

Under any of the various formulations of the proximate-cause standard, a person's failure to vote does not proximately cause the removal of a person's name from the official list of voters under Ohio's list-maintenance process. Removal is not, for instance, *directly related* to a person's failure to vote, because it is *more closely related to* and *purely contingent on* a person's failure to respond to the address-confirmation notice sent as part of the Confirmation Procedure. A person's failure to respond to the address-confirmation notice is, in other words, the *immediate* and *nearest antecedent* of removal. And a person's failure to vote is in any event not the *sole* proximate cause of removal, because a person has to fail to respond to the address-confirmation notice before they may be ultimately removed from the list on the basis that they have moved.

The court of appeals did not apply the prior-construction canon to construe "by reason of" because it wrote that key phrase out of the statute altogether. Compounding its failure to assign the contextually

appropriate meaning to "result," the court silently substituted that incompatible definition for "by reason of." This is how the court reached its "construction" that says a state violates the Failure-To-Vote Clause when "removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." Pet. App. 21a. The court thus incorporated a largely boundless standard of but-for causation into that clause, which opened the door for the court to interpret it to categorically prohibit consideration of failure-to-vote data in a list-maintenance process. *See* Pet. App.14a-15a, 20a-21a.

C. Apply the whole-text canon: construe the language and design of the statute as a whole.

Since context determines meaning, it makes sense to consider the entire context of the language under construction. With statutory construction, that means looking not only to the provision in question, but also to "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

This whole-text canon allows us to ascertain the particular proximate-cause standard the Failure-To-Vote Clause incorporates. Although common-law formulations of the proximate-cause standard varied, the standard is sometimes statute-specific. *CSX Transp.*, 564 U.S. at 693, 700 & 701; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) ("Proximate-cause analysis is controlled by the nature of the statutory cause of action."). And statutory context provides good reasons to believe that

the Failure-To-Vote Clause incorporates a specific proximate-cause standard: the common-law formulation of the proximate-cause standard that "cut off liability if a 'proximate cause' was not the *sole* proximate cause." *CSX Transp.*, 564 U.S. at 693 (citation omitted).

First, the Confirmation Procedure enacted contemporaneously with the Failure-To-Vote Clause contemplates that a state *may* consider a person's failure to vote if the state *also* considers the person's failure to respond to an address-confirmation notice. 52 U.S.C. § 20507(d)(1)(B). Unless we are to believe that Congress wrote contradictory provisions into the NVRA (*but see infra* section C. (applying the harmonious-reading canon, which presumes otherwise)), its inclusion of the use of failure-to-vote data as part of the Confirmation Procedure shows that the Failure-To-Vote Clause does not prohibit removing voters for failing to vote *plus something else*. *See also* H.R. Rep. No. 103-9, at 30 (1993) (Failure-To-Vote Clause was intended to "prohibit states from removing registrants from the list *simply for not voting*." (emphasis added)); S. Rep. No. 103-6, at 46 (1993).

Second, and perhaps most telling, Congress later made this sole-proximate-cause standard explicit. With HAVA, Congress required the states to create "file maintenance" systems that cause the removal of voters under the NVRA's Confirmation Procedure. 52 U.S.C. § 21083(a)(4)(A). The same provision setting out that requirement repeated the Failure-To-Vote Clause's prohibition, with one textual edit: it warned that "no registrant may be removed *solely* by reason of

a failure to vote." *Id.* (emphasis added). Importantly, this addition of "solely" cannot be read as a later relaxation of a (purportedly) formerly categorical Failure-To-Vote Clause, because HAVA forbade construing that Act "to authorize . . . conduct prohibited under . . . the [NVRA]." 52 U.S.C. § 21145(a)(4). Accordingly, the only sensible conclusion is that the Failure-To-Vote Clause *already* included, and still includes, the sole-proximate-cause standard that HAVA made express.

In sum, the Failure-To-Vote Clause incorporates a statute-specific proximate-cause standard that prohibits a state from conducting a list-maintenance program from removing voters *solely* because they failed to vote. Ohio's list-maintenance program does not do that, because it *also* requires that the voter failed to return an address-confirmation notice before removal is permitted.

As with the prior-construction canon, the court of appeals had no occasion to apply the whole-text canon to determine the applicable proximate-cause standard because it mistakenly wrote "by reason of" out of the statute entirely.

D. Apply the harmonious-reading canon: when possible, read provisions of the same text to harmonize, not conflict.

Drafters of statutes ordinarily do not contradict themselves (at least not on purpose). Courts therefore construe statutes so one provision does not contradict another. The "task is to fit, if possible, all parts into an

harmonious whole." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" (citations omitted)).

Applying this harmonious-reading canon here confirms that the Failure-To-Vote Clause does not categorically prohibit considering failure-to-vote data as part of a list-maintenance process. To see why, consider the apparent tension between that clause and the Confirmation Procedure: The Failure-To-Vote Clause prohibits list maintenance that results in voter removal by reason of failure to vote, while the Confirmation Procedure permits removal once a person fails to respond to a confirmation notice and then *fails to vote*. Under the court of appeals' reading, the Failure-To-Vote Clause categorically prohibits conduct that the Confirmation Procedure affirmatively requires if a state wants to use the list-maintenance process it explicitly permits.

By contrast, identifying proximate cause as the causation standard for the Failure-To-Vote Clause (as supported by the prior-construction and whole-text canons) harmonizes these clauses. The Confirmation Procedure does not conflict with a Failure-To-Vote Clause that prohibits only making failure to vote a *proximate* cause of voter removal. Removal of voters under that procedure is not the *sole* proximate cause

of removal, and removal is also *more closely related to* and *purely contingent upon* a person's failure to respond to the address-confirmation notice. The harmonious-reading canon favors that reading over one that puts two statutory provisions from the same Act in open and irreconcilable conflict.

The court of appeals recognized that interpreting the Failure-To-Vote Clause to categorically prohibit consideration of failure-to-vote data led to such a conflict. *See* Pet. App. 14a-15a. The court attempted to resolve that conflict by pointing to the clarifying language that HAVA appended to the Failure-To-Vote Clause. That "Clarification Amendment" stated: "nothing in [the Failure-To-Vote Clause] may be construed to prohibit a State from . . . remov[ing] an individual from the official list of eligible voters if the individual" fails to respond to an address-confirmation notice and then also fails to vote in the next two consecutive general elections for federal office. 52 U.S.C. § 20507(b)(2). The court of appeals held that, "under the [Clarification Amendment's] plain language," the Confirmation Procedure "is permissible even though the confirmation notice procedure itself involves consideration of a registrant's failure to vote." Pet. App. 15a.

But that line of reasoning contains an obvious flaw: it is anachronistic. As enacted in 1993, the NVRA included both the Failure-To-Vote Clause and the Confirmation Procedure. *See* National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77, 83-84. HAVA's Clarification Amendment, however, was not introduced into the NVRA until 2002. *See* Help

America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1728. This means that under the court of appeals' reading, there was an open and irreconcilable conflict between the Failure-To-Vote Clause and the Confirmation Procedure from 1993 until 2002: The first categorically prohibited conduct that the second affirmatively required as part of a permitted list-maintenance process.

The better reading is that the Failure-To-Vote Clause and the Confirmation Procedure do not conflict because the first only prohibits making failure to vote the sole proximate cause of voter removal, and implementing the Confirmation Procedure does not do that.

E. Acknowledge the difference between provisos and exceptions and treat them accordingly.

There is a "technical distinction between an exception and a proviso." *United States v. Cook*, 84 U.S. 168, 177 (1872). "A true statutory exception exists only to exempt something which would otherwise be covered by an act." 2A *Sutherland Statutory Construction* § 47:11 (7th ed.). Provisos, by contrast, function as rules of construction and are thus "commonly used to limit, restrain, or otherwise modify the language of the enacting clause." *Quackenbush v. United States*, 177 U.S. 20, 26 (1900); *accord* Scalia & Garner, *supra* at 154 (noting that a proviso "modifies the immediately preceding language").

Ideally exceptions would be introduced with "except that" and provisos with "provided that," so the reader could easily identify which was which. But poor

drafting is common, so it is not uncommon to see the opposite: provisos introduced with "except that" and exceptions introduced with "provided that." *See* Scalia & Garner, *supra* at 154. Thus, the "particular form of the words used to introduce the applicable provision generally does not determine whether it should be classed a proviso or an exception." 1A *Sutherland Statutory Construction* § 21:11 (7th ed.). Instead, the function of a provision controls that determination.

By that standard, the Clarification Amendment rests comfortably in the proviso camp. Although that clause starts with "except that," its plain language and context confirms that it functions as a proviso: a rule for how to construe the Failure-To-Vote Clause. Specifically, the Confirmation Amendment provides that "nothing in [the Failure-To-Vote Clause] *may be construed* to prohibit" certain conduct. 52 U.S.C. § 20507(b)(2) (emphasis added). In addition, the heading that preceded the amendment in HAVA reads, "*[c]larification* of ability of election officials to remove registrants from official list of voters on grounds of change of residence" (and not, for example, "exception to prohibition on removing voters by reason of failure to vote"). Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1728 (emphasis added); *see also* H.R. Rep. No. 107-730, at 81 (2002).[2] The Clarification Amendment is therefore best read as a proviso

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[2] Another canon of construction: Because titles and captions are adopted by Congress, they are permissible indicators of meaning. *See, e.g.*, *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

– a rule of construction that clarifies the meaning of the Failure-To-Vote Clause.

That reading is confirmed by this Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 582 (1988). In *DeBartolo*, the Court interpreted a provision that, like the Clarification Amendment, included a "shall not be construed" command. *Id.* The Court rejected an interpretation that treated "the proviso as establishing an exception to a prohibition that would otherwise reach the conduct excepted." *Id.* It noted that the proviso had "a different ring to it" because it included the "shall not be construed" command. *Id.* Then, consistent with the argument made above, the Court interpreted the proviso as a "clarification" "rather than an exception to a general ban." *Id.* at 586. That line of reasoning applies here as well.

This proviso/exception distinction matters here because it determines just what the Clarification Amendment says about how to read the Failure-To-Vote Clause. If the amendment were an exception – which is how the court of appeals treated it – that might leave open the possibility that the Failure-To-Vote Clause is a categorical prohibition on considering failure-to-vote data from which the amendment merely provided an exemption. By contrast, as a proviso, the Clarification Amendment explains that the Failure-To-Vote Clause *itself* permits states to use failure-to-vote data for list maintenance at least as part of the Confirmation Procedure. And for that to be true, the Failure-To-Vote Clause has to be something

less than a categorical prohibition on using failure-to-vote-data as part of a list-maintenance process.

Put simply, that the Clarification Amendment is a proviso that serves as further confirmation that (1) the court of appeals' decision is wrong and (2) the Failure-To-Vote Clause only prohibits removing voters based on failure to vote as the sole proximate cause of the removal.

CONCLUSION

Careful application of the appropriate canons of construction confirms that the NVRA does not prohibit Ohio's list-maintenance program. The decision below should be reversed.

Respectfully submitted,

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